IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 880 OF 2006

ICICI Securities Limited
(Formerly known as ICICI Securities
& Finance Co.Limited) ..Petitioner
v/s.
The Assistant Commissioner of Income tax
3(2), Mumbai and others .. Respondents

Mr.J.D.Mistry i/by M/s.Kanga & Co. for the petitioner.

Mr.Ashok Kotangale with Mr.S.R.Chauhan and Mr.A.D.Nagarjun for the respondents.

CORAM : R.M. LODHA &
J.P.DEVADHAR, JJ.

DATED : 31ST MARCH, 2006.

P.C.

We heard Mr.J.D.Mistry, the counsel for the petitioner and Mr.Ashok Kotangale, the counsel for the respondents.

2. The petitioner is a public limited company and is engaged in trading securities being shares and debentures and other non-banking financial activities. For the assessment year 1998-99, the petitioner filed return of income on 27th November, 1998 in which it disclosed an income of Rs.29,73,13,560/-. While doing so, the petitioner carried forward loss of Rs.10,91,56,111/- by taking aid of section 45(2) of Income Tax Act, 1961. By the order dated 16th February, 2001, passed under section 143(3) of the Act, after making certain additions and disallowances, the Assessing Officer

computed the total income of the petitioner at Rs.33,14,14,880/- and determined an amount of Rs.3,11,71,314/- as payable by the petitioner towards the income tax.

3. The petitioner preferred appeal against the assessment order dated 16th February, 2001 before the Commissioner of Income Tax (Appeals). The appellate authority vide order dated 16th May, 2001 partly modified the order of assessment by directing to exclude certain amount being the principal amount from the lease rental received from Rajasthan State Electricity Board.

4. The assessing officer issued notice dated 25th February, 2005 to the petitioner under section 148 of the Income Tax Act wherein it is stated that he had reasons to believe that its income chargeable to tax for the assessment year 1998-99 had escaped assessment within the meaning of section 147 of the Act. By the said notice, the petitioner was asked to furnish in prescribed form its income for the assessment year 1998-99.

5. The petitioner upon receipt of the notice dated 25th February, 2005 sought reasons from the assessing officer for reopening the assessment for the year 1998-99. The reasons were furnished by the assessing officer on 9th August, 2005.

6. The petitioner after receipt of the reasons filed its objections

to the notice on 17.8.2005.

7. The assessing officer sought certain details from the petitioner vide his communications dated 21st August, 2005 and 14th October, 2005. In response thereto, the assessee is said to have submitted the requisite information on 27th October, 2005.

8. On 17th February, 2006, the assessing officer disposed of the objections. The said order was received by the assessee on 22nd February, 2006. Thereafter, on 24th February, 2006, the assessing officer passed the assessment order pursuant to the notice issued to the petitioner under section 148 of the Income Tax Act. By the order dated 24th February, 2006, the assessing officer pursuant to the notice under section 148, ordered speculation loss of Rs.19,75,41,936/- to be carried for the set off and negatived the contention of the assessee that the loss was business loss in share and debentures transactions.

9. It may be noticed here that initially the petitioner filed writ petition before this court on 28th February, 2006 challenging the notice dated 25th February, 2005 issued under section 148 for reopening of the assessment for the assessment year 1998-99 and the order dated 17th February, 2006 disposing of the petitioner's objections. The petitioner is said to have filed two more writ petitions on 28th February, 2006 and 2nd March, 2006 challenging the notices under section 148 for reopening of the assessment for

the assessment years 2000-01 and 2001-02. The petitioner has averred in the writ petition that immediately after filing the two writ petitions on 28th February, 2006, the petitioner's solicitors M/s.Kanga & Co. addressed a letter dated 28th February, 2006 informing the respondent No.1 that the petitioner had filed two writ petitions in respect of the assessment years 1998-99 and 2000-01 and that he should not take further proceedings pursuant to the notices issued under section 148 of the Income Tax Act.

10. The petitioner has averred that it was shocked and surprised to receive on 2nd March, 2006, an order purportedly dated 24th February, 2006 passed under section 143(3) read with section 147 of the Act taking the view that difference between the cost and the fair market value of the shares could not have been claimed as capital loss under section 45(2) but has to be treated as speculation loss under section 73. Though in the writ petition, no averment is made about withdrawal of the earlier writ petition, we are informed by the counsel for the petitioner that writ petition was withdrawn on 24th March, 2006 and the present writ petition was lodged on the same day.

11. By means of this writ petition, the petitioner seeks to impugn the notice dated 25th February, 2005 issued under section 148 of the Income Tax Act together with the assessment order dated 24th February, 2006 passed under section 143(3) read with section 147 of the Act for the assessment year 1998-99.

12. During the course of arguments, we indicated to the counsel for the petitioner that now since the assessment order has already been passed on 24th February, 2006, it would not be sound exercise of jurisdiction to entertain this writ petition and the petitioner must exhaust the alternative remedy provided under the Income Tax Act. The counsel invited our attention to the case of Supreme Court in the case of Calcutta Discount Co.Ltd. v. Income-Tax Officer, Companies District I, Calcutta and another, 41 ITR 191 and prayed for keeping the matter back to enable him to cite a dozen cases of the Supreme Court and this Court taking the view that even after the assessment order has been passed pursuant to the notice under section 148, the High Court should interfere in the notice as well as the assessment order. We did not deem it proper to keep the matter back since we had already heard the matter for some time. Thrice the counsel insisted for giving him time until afternoon but on all three occasions we declined to grant prayer as we thought that it was not justified and insistence was too much. He wanted us to record in our order that he sought time and we declined. Though it sounded strange to us; `surely we would', we told the counsel.

13. The counsel for the petitioner cited the judgment of the Supreme Court in the case of GKN Driveshafts (India) Ltd. v. Income-Tax Officer and others, 259 ITR 19. He submitted that the observation made by the Supreme Court in GKN Driveshafts that

if the objections are filed by an assessee after receipt of the reasons for reopening of the assessment under section 148, such objections had to be disposed of by speaking order before proceeding with the assessment of those years. He submitted that that would necessarily mean that sufficient time should be given to such assessee to challenge the same in appropriate proceedings before passing the assessment order. He would submit that firstly, no sufficient opportunity was given to the petitioner to challenge the order dated 17th February, 2006 whereby the objections filed by the petitioner were overruled inasmuch as the said objections were received by the petitioner on 22nd February, 2006 and the assessment order under section 147 read with section 143(2) was passed within two days therefrom that is on 24th February, 2006 and secondly, that the order dated 17th February, 2006 is not a speaking order.

14. The submissions do not appeal us. In GKN Driveshafts (India) Ltd., the Supreme Court said that pursuant to the notice under section 148 and disclosure of reasons for reopening of assessment, if the assessee files objections, such objections must be disposed of by a speaking order before proceeding with the assessment for those years. That is what the Supreme Court said.

> "We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income-tax Act is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to

> furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

15. Reverting back to the facts of this case, to appreciate the applicability of the judgment of the Supreme Court, it would be seen that the notice under section 148 was issued to the petitioner on 25th February, 2005. The reasons were disclosed on 9th August, 2005. Upon receipt of reasons, the petitioner filed objections on 17th August, 2005. The assessing officer sought certain information from the petitioner before disposal of objections and ultimately, by the order dated 17th February, 2006, the objections were disposed of and the said order was received by the petitioner on 22nd February, 2006. It was only after the disposal of the objections that the assessing officer proceeded to pass an assessment order. Where is the illegality in the approach of the assessing officer. In GKN Driveshafts (India) Ltd. it is not held that after disposal of the objections by the assessee, the assessing officer must give time to the assessee to challenge the same and thereafter, proceed with the reassessment. As a matter of fact, until the assessment order dated 24th February, 2006 came to be passed by the assessing officer, the petitioner had not even challenged the notice under section 148 which was admittedly

received by him on 25th February, 2005 and reasons were disclosed on 9th August, 2005. The earlier writ petition was filed by the petitioner on 28th February, 2006. By that time the assessment order dated 24th February, 2006 was already passed but what was challenged in the said writ petition was the notice under section 148 and the order disposing of the objections. What is important is not whether the petitioner had by that time received the copy of the order dated 24th February, 2006 or not but the fact of the matter is that the assessment order came to be passed by the assessing officer on 24.2.2006 after the disposal of objections on 17.2.2006 and that the earlier writ petition was filed by the petitioner on 28.2.2006 after the assessment order had already been passed on 24.2.2006. The said writ petition was withdrawn with liberty to file fresh writ petition.

16. The present writ petition has been filed on 24th March, 2006 challenging the notice dated 25th February, 2005 and the assessment order dated 24th February, 2006 passed under section 143(3) read with section 147 of the Act. That the Income Tax Act, 1961 is self-contained code and provides adequate and sufficient remedy in challenging the order dated 24th February, 2006 cannot be disputed. In our view, therefore, the petitioner has alternative and efficacious remedy in challenging the said order, and, there is nothing extra ordinary in the facts and circumstances of the case which justifies bypassing the statutory remedy.

17. In the case of Calcutta Discount Co., the writ petition was filed challenging the notices under section 34 of the Indian Income Tax Act, 1922 before the orders pursuant to the said notices were passed by the assessing officer. The petitioner prayed for writ of prohibition in challenging those notices; prohibiting the income tax officer from continuing the assessment proceedings on the basis of the said notices. Interalia, the objection on behalf of the revenue was that the question as to whether the officer had reason to believe that no assessment had resulted of non-disclosure of material facts, before the income tax officer himself, the assessee shall have an opportunity to raise the issue and if unsuccessful, the question can be raised before the appellate officer or the appellate tribunal or the High Court in advisory jurisdiction under section 66(2) of the Indian Income Tax Act, 1922. The Supreme Court held that existence of such alternative remedy was not always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. The notices were held without jurisdiction and in the circumstances, though the assessment orders were in the while made during the pendency of the writ petition, the Supreme court while setting aside the notices under section 34 of the Indian Income Tax Act, 1922 also set aside the assessment orders. Calcutta Discount Co.Ltd., in our considered opinion, is not applicable to the facts of the present case.

18. As to whether the availability of an alternative remedy may justify refusal to invoke extra ordinary jurisdiction would depend on facts of each case. Ordinarily, where the statutory provisions are self contained and provide the efficient and alternative remedy, the High Court may refuse to exercise jurisdiction under Article 226 of the Constitution of India. This is a rule of prudence and self restraint and not a matter of bar. The counsel for the petitioner submitted that if the petitioner is driven out to file the appeal, the appellate authority may not dispose of the appeal quickly and that demand may be raised and recovered and, therefore, the alternative remedy of appeal is not efficient. We are not at all impressed by the submission. The submission is in realm of conjecture.

19. We thought of dealing with another argument of the counsel that the objections have not been disposed of by the speaking order but the learned counsel for the petitioner cited our order passed on 7th June, 2004 in writ petition No.1182 of 2004, Allanasons Limited v. The Assistant Commissioner of Income Tax 1 (1) & ors. and submitted that the direction be issued to the appellate authority for expeditious disposal of the appeal and until then the assessing officer (first respondent) be restrained from recovering the tax due pursuant to the order dated 24th February, 2006 by any coercive process. The counsel for the petitioner also submits that within one week from today, the petitioner shall file an appeal before the Commissioner of Income Tax (Appeals),

Mumbai-III.

20. In Allanasons Limited the appeal had already been filed and was pending. That is not the case here. However, since the petitioner intends to challenge the order dated 24.2.2006 by filing an appeal, we are of the view that interest of justice shall be sub-served by passing the similar order.

21. The learned counsel for the petitioner now submits that the petitioner may be allowed to withdraw the writ petition.

22. We, accordingly, dismiss the writ petition as withdrawn with liberty to file appeal against the order dated 24th February, 2006. We expect the Commissioner of Income Tax (Appeals) to hear and decide the appeal expeditiously. We also direct that until the disposal of appeal and for a period of four weeks from the date of service of the order, no coercive process shall be taken by the respondent No.1 in recovering the demand pursuant to the assessment order dated 24th February, 2006.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)